

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	EB Docket No. 04-296
Review of the Emergency Alert System)	
)	PS Docket No. 15-94
)	

ORDER ON RECONSIDERATION

Adopted: July 23, 2018

Released: July 24, 2018

By the Commission:

I. INTRODUCTION

1. PanAmSat Corporation, SES Americom, Inc., and Intelsat, Ltd. (collectively, Petitioners) jointly filed a petition for partial reconsideration of the *EAS First Report and Order*¹, which established Emergency Alert System (EAS) requirements for certain Fixed Satellite Service (FSS) satellite operators that sell or lease satellite transponder capacity to video programming distributors.² In this Order on Reconsideration, we deny Petitioners' request that we shift the EAS obligations adopted for Ku band³ FSS licensees to the video programming distributors that lease transponder capacity from such licensees. We also deny Petitioners' alternative request that we not apply the FSS EAS rules to FSS satellite operations subject to satellite capacity lease agreements already in place when the FSS EAS requirements became effective. We do, however, grant the Petition to the extent that we adopt more specific criteria for determining when EAS obligations are triggered for FSS licensees whose satellites are used to provide programming directed primarily to consumers outside the U.S., with only incidental reception by consumers in the U.S.

¹ *Review of the Emergency Alert System*, EB Docket No. 04-296, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 18625 (2005) (*EAS First Report and Order*).

² See Petition for Partial Reconsideration of PanAmSat Corporation, SES Americom, Inc., and Intelsat, Ltd., EB Docket No. 04-296 (filed Dec. 27, 2005) (Petition). PanAmSat Corporation merged into Intelsat in 2006. See *In the Matter of Constellation, LLC, Carlyle PanAmSat I, LLC, Carlyle PanAmSat II, LLC, PEP PAS, LLC, and PEOP PAS, LLC, Transferors, and Intelsat Holdings, Ltd., Transferee, Consolidated Application for Authority to Transfer Control of PanAmSat Licensee Corp. and PanAmSat H-2 Licensee Corp.*, IB Docket No. 05-290, Memorandum Opinion and Order, 21 FCC Rcd 7368 (2006). Thus, we treat PanAmSat and Intelsat as one party for purposes of this proceeding. We also note that there is one other pending petition for partial reconsideration of the *EAS First Report and Order*, filed by XM Radio Inc. (which subsequently merged into Sirius Satellite Radio Inc. in 2008). See Petition for Partial Reconsideration and Clarification of XM Radio Inc., EB Docket No. 04-296 (filed Dec. 27, 2005). That petition seeks reconsideration of aspects of the *EAS First Report and Order* unrelated to those raised in the instant Petition, and will be addressed in a separate item.

³ The term "Ku band" for purposes of this Order refers to the 11.7-12.2 GHz (space-to-Earth) and 14.0-14.5 GHz (Earth-to-space) bands. See 47 CFR § 25.103.

II. BACKGROUND

A. The EAS

2. The EAS is a national public warning system through which broadcasters, cable systems, and other service providers (EAS Participants)⁴ deliver alerts to the public to warn them of impending emergencies and dangers to life and property.⁵ The primary purpose of the EAS is to provide the President with “the capability to provide immediate communications and information to the general public at the national, state and local levels during periods of national emergency.”⁶ The EAS also is used by state and local governments, as well as the National Weather Service, to distribute alerts.⁷

B. The EAS First Report and Order

3. In 2005, in recognition that consumers were increasingly adopting digital technologies as replacements for analog broadcast and cable systems that were already subject to EAS requirements, the Commission adopted the *EAS First Report and Order*, expanding EAS obligations to digital television and radio, digital cable, and satellite television and radio services.⁸ The Commission deemed that “some level of EAS participation must be established for these new digital services to ensure that large portions of the American public are able to receive national and/or regional public alerts and warnings.”⁹

4. With respect to satellite video services, the Commission, in part pursuant to its jurisdiction under section 303(v) of the Communications Act of 1934, as amended (the “Act”), to regulate direct-to-home (DTH) satellite services,¹⁰ extended EAS obligations to DBS services, as defined in section 25.701(a)(1)-(3) of the Commission’s rules.¹¹ As used in section 25.701(a), the definition of DBS

⁴ The Commission’s rules define EAS Participants as radio broadcast stations, including AM, FM, and low-power FM stations; Class A television and low-power TV stations; cable systems; wireline video systems; wireless cable systems; direct broadcast satellite service providers; and digital audio radio service providers. *See* 47 CFR § 11.11(a).

⁵ *See Review of the Emergency Alert System; Independent Spanish Broadcasters Association, The Office of Communication of the United Church of Christ, Inc., and the Minority Media and Telecommunications Council, Petition for Immediate Relief*, Fifth Report and Order, 27 FCC Rcd 642, 646, para. 6 (2012) (*Fifth Report and Order*). A more detailed history of the EAS is summarized in the *First Notice of Proposed Rulemaking* in this docket. *See Review of the Emergency Alert System*, EB Docket No. 04-296, Notice of Proposed Rulemaking, 19 FCC Rcd 15775, 15776-77, paras 6-8 (the *First Notice of Proposed Rulemaking*). In addition, an overview of the present organization and functioning of the EAS system is included in the *Second Report and Order*. *See Review of the Emergency Alert System; Independent Spanish Broadcasters Association, The Office of Communication of the United Church of Christ, Inc., and the Minority Media and Telecommunications Council, Petition for Immediate Relief*, Second Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 13275, 13280-83, paras. 11-14 (2007).

⁶ 47 CFR § 11.1.

⁷ EAS Participants are required to broadcast Presidential alerts; they participate in broadcasting state and local EAS alerts on a voluntary basis. *See* 47 CFR § 11.55(a).

⁸ In taking this action, the Commission observed, among other things, that as of 2005, approximately 25 percent of TV households subscribed to Direct Broadcast Satellite (DBS) services, and over 23 percent subscribed to digital cable television, yet neither platform was subject to EAS obligations. *See EAS First Report and Order*, 20 FCC Rcd 18626-27, para. 2.

⁹ *Id.*

¹⁰ 47 U.S.C. § 303(v).

¹¹ *See EAS First Report and Order*, 20 FCC Rcd 18645-46, para. 49; 47 CFR § 11.11(a). Subsequent to the *EAS First Report and Order*’s adoption, the DBS definition in section 25.701(a) was expanded to include U.S.-licensed and non-U.S.-licensed satellite operators in the 17/24 GHz Broadcasting-Satellite Service (BSS). *See The Establishment of Policies and Service Rules for the Broadcasting-Satellite Service at the 17.3-17.7 GHz Frequency*

includes entities licensed to operate FSS satellites in the Ku band that “sell or lease capacity to a video programming distributor that offers service directly to consumers providing a sufficient number of channels so that four percent of the total applicable programming channels yields a set aside of at least one channel of non-commercial programming pursuant to [section 25.701(e) of the Commission’s rules]” (hereinafter, “DTH-FSS licensees”).¹² The Commission anticipated that this definition would “ensure[] that the EAS rules apply to the vast majority of existing DTH satellite services, particularly those for which viewers may have expectations as to available warnings based on experience with broadcast television services.”¹³ With respect to compliance requirements, the Commission generally required DBS entities to participate in national EAS activations, and meet related monitoring, testing and equipment readiness requirements.¹⁴

5. The Commission, however, allowed DTH-FSS licensees to delegate their EAS obligations to the video programming distributors that lease capacity on their satellites. Specifically, the Commission stated that “compliance with EAS requirements may be established based upon a certification from a [video programming] distributor that expressly states that the distributor has complied with the EAS obligations.”¹⁵ The Commission added that the DTH-FSS licensees “will not be required to verify compliance by distributors unless there is evidence that the distributor has not met its obligation.”¹⁶ The Commission concluded that placing ultimate compliance responsibility on the DTH-FSS licensees under this scheme was not unduly burdensome because the “certification requirements can be included in satellite carriage and leasing contracts,” and because it was similar to the certification scheme adopted for FSS Part 25 licensees to meet their DBS public interest obligations.¹⁷ The Commission declined to apply EAS obligations to Home Satellite Dish (HSD) service¹⁸, which also falls under the Commission’s DTH jurisdiction.¹⁹

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Band and at the 17.7-17.8 GHz Frequency Band Internationally, and at the 24.75-25.25 GHz Frequency Band for Fixed Satellite Services Providing Feeder Links to the Broadcasting-Satellite Service and for the Satellite Services Operating Bi-directionally in the 17.3-17.8 GHz Frequency Band, IB Docket No. 06-123, *Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 8842 (2007). These BSS operations are not subject to EAS requirements.

¹² 47 CFR § 25.701(a)(2). In adopting this rule (which was originally codified at 47 CFR § 100.(a)(2)), the Commission explained that “a DBS provider must offer at least 25 channels of video programming to be subject to these rules (4% of 25 programming channels equals one set-aside channel) . . .” *Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992*, MM Docket 93-25, *Report and Order*, 13 FCC Rcd 23254, 23266 n.58 (1998) (*DBS Public Interest Order*), *reconsideration granted in part, denied in part, Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992; Direct Broadcast Satellite Public Interest Obligations; Sua Sponte Reconsideration*, MM Docket 93-25, *Second Order on Reconsideration of First Report and Order*, 19 FCC Rcd 5647, 5650-54 (2004) (*DBS Second Order on Reconsideration*).

¹³ *EAS First Report and Order*, 20 FCC Rcd 18645-46, para. 49.

¹⁴ *See id.*, 20 FCC Rcd 18647-50, paras. 53-57. *See also, e.g.*, 47 CFR § 11.11(a), 11.51(j), 11.52(a), 11.61(a)(1)(ii), (a)(2)(ii), (a)(3). DBS providers offering “local-into-local” service, however, must pass through any state and local EAS alerts aired on the local television broadcast programming they carry. *See* 47 CFR § 11.55(a)(1).

¹⁵ *EAS First Report and Order*, 20 FCC Rcd 18645-46, para. 49, n. 152.

¹⁶ *Id.*

¹⁷ *Id.* (citing *DBS Public Interest Order*, 13 FCC Rcd 23254, 23264, para. 25; *DBS Second Order on Reconsideration*, 19 FCC Rcd 5647, 5650-54 (2004) (clarifying that “an FSS Part 25 licensee may demonstrate compliance with the provisions of Sections 100.5(b) and (c) of the Commission’s rules (new Section 25.701(b) and (c)) by submitting a certification from a distributor that expressly states that the distributor has complied with the obligations of Section 335 of the Act”).

¹⁸ Although HSD service is not defined in the Commission’s rules HSD is the original satellite-to-home service offered to consumers, who purchase and install large dish (between four and eight feet in diameter) antennas at their homes or businesses to receive signals transmitted by satellites operating generally in the C-band frequencies. (By

C. The Petition

6. The Petitioners state that they “support the application of the EAS requirements to DTH-FSS services,” but seek reconsideration of three aspects of the Commission’s decision adopting such requirements.²⁰ First, the Petition requests that the Commission modify the FSS EAS requirements adopted in the *EAS First Report and Order* by applying them directly to the video programming distributors that lease transponder capacity from the DTH-FSS licensees instead of applying them to the DTH-FSS licensees themselves.²¹ Second, in the alternative, the Petition requests that the Commission not apply the FSS EAS rules to satellite transponder(s) that were subject to pre-existing satellite capacity lease agreements already in place when the FSS EAS requirements became effective.²² Third, the Petition requests that the Commission “provide an exemption from the EAS requirements for DTH-FSS services that are directed primarily to consumers outside the United States but also are made available to consumers in the United States.”²³

7. With respect to their contention that responsibility for EAS compliance should be shifted from the DTH-FSS licensees to their lessee video programming distributors, Petitioners argue that, for all other services, the EAS rules apply to “the entity that delivers programming to the consumer and therefore is in a position to substitute emergency messages when the EAS system is activated.”²⁴ Petitioners contend that “[i]n the case of broadcast services, for example, the requirements apply to the stations that transmit programming to consumers’ radio and television receivers.”²⁵ Petitioners contend that the Commission did not explain why it departed from this approach in the DTH-FSS case.²⁶ Petitioners argue that DTH-FSS programming distributors are best situated to comply with the FSS EAS requirements because they are the entities that generate and control the program content that is delivered via the satellite.²⁷ Petitioners also liken their situation to the HSD providers exempted from EAS obligations in the *EAS First Report and Order* in that, like HSD providers, DTH-FSS licensees do not

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“C-band,” we refer specifically to the 3700-4200 MHz downlink and 5925-6425 MHz uplink frequency bands. See 47 CFR § 25.103.) HSD service includes “[C-band FSS] satellites [] operated by a number of FCC space station licensees that sell or lease satellite transponders to the various programmers providing the signals,” and is composed largely of free-to-air programming. *EAS First Report and Order*, 20 FCC Rcd 18645-46, paras. 49, n.147. The Commission elected not to apply EAS obligations to HSD providers on grounds that there were only approximately 145,000 HSD users (and decreasing) around the time the *EAS First Report and Order* was adopted, and because “HSD users receive programming directly from programmers, it would be very burdensome for HSD providers to distribute EAS messages to subscribers.” *Id.* at 20 FCC Rcd 18650, para. 58. Currently, there is little or no publicly available data on large home satellite dish (or C-Band) service usage.

¹⁹ See *id.* at 20 FCC Rcd 18645-46, paras. 49-50.

²⁰ See Petition at 3.

²¹ See Petition at 4-10.

²² See *id.* at 10-11.

²³ *Id.* at 4, 11-12.

²⁴ Petition at 4.

²⁵ *Id.*

²⁶ See *id.*

²⁷ See *id.* at 5-9. Petitioners further contend, for their part, that the DTH-FSS satellite operator has “no relationship with the subscriber and has no control over program content,” and often has no idea whether the space segment “is to be used for DTH service.” *Id.* at 5. Petitioners also argue that the Commission has jurisdiction over the DTH-FSS program distributors on grounds that these entities “use radio stations (i.e., receive-only earth stations) to serve their subscribers,” but if insufficient, the Commission “could reinstate for DTH-FSS services the requirement that licenses be obtained for receive-only earth stations.” *Id.* at 10.

control the programming that is transmitted over the satellite to HSD consumers.²⁸

8. With respect to the certification mechanism through which DTH-FSS licensees delegate responsibility for EAS obligations to their lessees, Petitioners argue that attaching EAS compliance obligations to DTH-FSS programming distributors through their capacity lease agreements with DTH-FSS satellite operators is inefficient, and does not provide for direct enforcement of compliance, but instead subjects resolution of compliance questions to private contract litigation.²⁹

9. Petitioners also request that the FCC exempt DTH-FSS services offered primarily outside the U.S., but incidentally made available to U.S. subscribers. Petitioners contend that such exemption is needed because “[i]t is highly improbable that the distributors of these services would be willing to preempt normal programming for announcements from the President of the United States.”³⁰ Instead, according to Petitioners, these video programming distributors would cease marketing their services in the U.S., thus depriving the public of “access to valuable programming.”³¹ Petitioners further argue that applying EAS requirements in this context amounts to regulating the content of foreign programming.³² Petitioners thus propose that the Commission exempt DTH services directed “primarily in foreign countries” from EAS obligations, and suggest that the Commission “employ a standard of 50% of the area or population within a footprint for determining whether the primary audience for a DTH service is outside the United States.”³³

10. Two parties, EchoStar Satellite L.L.C. (EchoStar) and DIRECTV Latin America, LLC (DTVLA) filed oppositions to the Petition.³⁴

²⁸ See *id.* at 7-8. In support of their contention that EAS obligations should be placed upon the DTH-FSS programming distributor rather than the DTH-FSS licensee, Petitioners argue that “[i]f it is ‘very burdensome’ for HSD service providers to distribute EAS messages, therefore, it is ‘very burdensome’ for FSS operators to do the same.” *Id.* at 8.

²⁹ See *id.* at 5-9. Petitioners further contend that this mechanism of implementing EAS compliance is unduly burdensome to the DTH-FSS licensees. See *id.* at 6-7.

³⁰ *Id.* at 11.

³¹ *Id.*

³² *Id.* at 11-12.

³³ *Id.* at 11.

³⁴ Opposition of EchoStar Satellite L.L.C. to the Petition for Partial Reconsideration of PanAmSat Corporation, SES Americom, Inc., and Intelsat, Ltd. (filed March 2, 2006) (EchoStar Opposition); Opposition to Petition for Partial Reconsideration, DIRECTV Latin America, LLC (filed March 2, 2006) (DTVLA Opposition). EchoStar argues that the Commission has previously rejected the argument that DTH-FSS satellite operators leasing capacity “have no control over the programming that is provided by their DTH lessees and therefore cannot affect the programming provided to U.S. subscribers” in the *DBS Public Interest Order*. EchoStar Opposition at 5 (*citing DBS Public Interest Order*, 13 FCC Rcd. 23254, 23264, para. 25). EchoStar also opposes adoption of earth station licensing requirements as a mechanism for asserting direct jurisdiction over DTH-FSS programming distributors. EchoStar Opposition at 7. EchoStar also opposed the Petition on procedural grounds because it relies on facts not previously presented to the Commission. See EchoStar Opposition at 3. We do not reach that argument because we are denying the Petition’s requests to which EchoStar objected on other grounds. DTVLA opposes the Petition’s request to apply EAS obligations on the DTH-FSS programming distributors, arguing that “[t]he Commission’s licensing authority under Title III generally runs to the FSS operator, not to the video programming distributors that merely buy or lease capacity from FSS operators.” DTVLA Opposition at 3 (*citing* 47 U.S.C. § 301). DTVLA also argued that the Commission’s authority under Sections 1, 4(i) and (o), 303(r) and 706 of the Act, 47 U.S.C. §§ 151, 154(i), 154(o), 303(r) and 606, historically cited as bases to impose EAS obligations “do not provide an adequate basis for imposing EAS requirements on non-licensee programming distributors.” *Id.* at 4. Petitioners filed a reply

III. DISCUSSION

11. We deny the Petition's request to apply the FSS EAS requirements directly to the video programming distributors that lease transponder capacity from DTH-FSS licensees instead of applying them to the DTH-FSS licensees themselves. As a practical matter, the Commission's ability to enforce the EAS requirements in this satellite context could be compromised if ultimate compliance responsibility were not placed on the DTH-FSS licensees. As the Commission observed in the DBS public interest certification proceeding (which implemented a certification regime upon which the DTH-FSS EAS certification scheme is modeled), the Commission has greater enforcement powers under the Act over satellite licensees than direct-to-home, non-licensee programmers, and it also has greater ownership information about such licensees than it has about these programmers.³⁵ With respect to the DBS public interest certification scheme, the Commission concluded that "placing the ultimate compliance responsibility on the satellite licensees is not unduly burdensome."³⁶ We arrive at the same conclusion in the context of DTH-FSS EAS obligations. We observe that over the past decade during which the DTH-FSS EAS rules have been in effect, the Commission has not been apprised by DTH-FSS licensees of any significant problems associated with their implementation.³⁷ That the DTH-FSS licensees lease the use of their satellites to video programming distributors and other entities is a business model choice of their own making that the EAS certification regime for DTH-FSS licensees attempts to accommodate.³⁸

12. Petitioners contend that, in all cases but Petitioners', the Commission has applied the requirements associated with disseminating authorized EAS alerts "to the entity that delivers

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to these oppositions. See PanAmSat Corporation, SES Americom, Inc., and Intelsat, Ltd., Consolidated Reply to Opposition to Petition for Partial Reconsideration (filed March 15, 2006) (Consolidated Reply).

³⁵ See *DBS Public Interest Order*, 13 FCC Rcd at 23264, paras. 23; see also *DBS Second Order on Reconsideration*, 19 FCC Rcd 5647, 5652-53, para. 14 (observing that "[b]ecause the Commission maintains ownership information for satellite licensees, and does not have similar records for lessees or program distributors, monitoring licensees is easier and enforcement is more effective").

³⁶ *DBS Second Order on Reconsideration*, 19 FCC Rcd 5653, para. 15.

³⁷ We also suspect that there are few if any current FSS leasing arrangements that trigger the FSS EAS obligations. We observe, for example, that no DTH-FSS licensees or their lessees filed reports related to the national EAS test conducted in September 2016.

³⁸ While Petitioners liken their situation to the HSD providers exempted from EAS obligations in the *EAS First Report and Order*, inasmuch as DTH-FSS licensees do not control the programming that is transmitted over the satellite to consumers, that operational condition was but one aspect of the Commission's rationale for not applying EAS obligation to HSD providers. See Petition at 7-8. In reaching its decision to exempt HSD providers from EAS obligations, the Commission observed that HSD service was composed largely of free-to-air programming providers, who have no knowledge of which consumers are watching such programming or where they are located, and thus have no way of targeting alerts to their intended audience. See *EAS First Report and Order*, 20 FCC Rcd 18650, para. 58, n. 190. The Commission also factored in that there were only approximately 145,000 HSD users (and decreasing) around the time the *EAS First Report and Order* was adopted, and thus, the benefit was not worth the burden—a notion that the record in this proceeding gives us no basis to revisit. See *id.* Petitioners have not demonstrated that these determinative conditions apply equally to DTH-FSS service, and in any event, neither condition would seem to support shifting EAS obligations from DTH-FSS licensees to DTH-FSS video programming distributors. Further, while Petitioners argue that it is equally problematic for DTH-FSS licensees to meet EAS obligations as the Commission acknowledged it would be for HSD providers, we observe that the Commission rejected similar arguments in earlier DBS proceedings on grounds that the Ku-band FSS lessee could delegate responsibility for complying with the DBS Public Interest requirements to its lessees. See *DBS Public Interest Order*, 13 FCC Rcd at 23264, para. 25. As in that proceeding, the Commission has adopted an optional certification regime that addresses the lessened control DTH-FSS licensees have over the programming transmitted over their leased transponders by allowing them to delegate responsibility for EAS compliance to their capacity lessees via their capacity lease agreements.

programming to the consumer,” and that DTH-FSS has been treated dissimilarly without explanation.³⁹ We find that this comparison is inaccurate and thus reject Petitioners’ request that we shift the compliance burden to program suppliers. As Petitioners themselves point out, for broadcast services, broadcast licensees must disseminate authorized EAS alerts and follow other related requirements.⁴⁰ Similarly, in the case of cable services, the cable operator is responsible for following these EAS requirements. These EAS obligations, in either instance, do not attach to the entity that supplies the programming.⁴¹ In the case of DTH-FSS satellites, it is the FSS satellite transponders—not the program suppliers—that transmit the programming to consumer receivers, and are thus similarly situated to the other types of entities that participate in the EAS, and consequently, are appropriately subject to these EAS requirements.⁴²

13. We also deny the Petition’s alternative request that the Commission not apply the FSS EAS rules in instances where satellite transponders are subject to preexisting capacity lease agreements that were in effect before the FSS EAS obligations became effective.⁴³ The FSS EAS obligations were adopted on November 10, 2005, but were not made effective until May 31, 2007.⁴⁴ Petitioners argue that “[t]he FSS satellite operators have no means [] of requiring EAS compliance in connection with capacity agreements that were entered into prior to the effective date of the R&O.”⁴⁵ Petitioners subsequently argued that “many DTH-FSS capacity agreements are long-term contracts with terms extending beyond 2007.”⁴⁶ Petitioners did not specify how far beyond 2007 their capacity agreements entered into prior to the adoption of the FSS EAS requirements in 2005 might extend, and it is unclear whether any such agreements are still in effect today. That said, licensees in a regulated industry remain subject to new rules deemed by the Commission to be appropriate and in the public interest.⁴⁷ As to the particular circumstances here, we expect that such private arrangements would have included accommodations to account for changes in the regulatory or statutory framework. And, had such implementation issues persisted beyond that time frame, we would have expected to see other indicia of such difficulties.⁴⁸ In

³⁹ Petition at 4.

⁴⁰ *Id.* at 4.

⁴¹ Our determination here relates to following requirements to disseminate authorized EAS messages and does not pertain to enforcing rules prohibiting dissemination of false EAS alerts, for which the Commission has determined to extend liability under its rules not only to broadcast licensees, cable systems, and other EAS participants, but also to other entities (such as cable programmers) for which entities besides an EAS participant may be found liable under our rules and precedent. *See* 47 CFR § 11.45; *Viacom, Inc.*, Forfeiture Order, 30 FCC Rcd 797 (2015) (assessing monetary forfeitures of \$1,120,000 against Viacom Inc. and \$280,000 against ESPN Inc., respectively, for violations of the Commission’s laws that prohibit misuse of tones reserved for the EAS).

⁴² The main difference between the DTH-FSS and broadcast station examples is that the programming transmitted by the leased DTH-FSS satellite transponder is delivered to the satellite for further transmission by the lessee, whereas the broadcast station selects the programming it disseminates over its transmitter.

⁴³ *See* Petition at 10-11.

⁴⁴ *See EAS First Report and Order*, 20 FCC Rcd 18649, para. 56. The Commission provided approximately 18 months of transition time for DBS providers to make system modifications required to meet their EAS obligations.

⁴⁵ Petition at 10.

⁴⁶ Consolidated Reply at 5.

⁴⁷ *See, e.g., Mobile Relay Associates v. FCC*, 457 F.3d 1, 11, (D.C. Cir. 2006) (citations omitted) (internal quotation marks omitted) (“The Commission is entitled to reconsider and revise its views as to the public interest and the means needed to protect that interest if it gives a reasoned explanation for the revision.”); *Celtronix Telemetry Inc. v. FCC*, 272 F.3d 585, 589 (D.C. Cir. 2001) (“... it is undisputed that the Commission always retained the power to alter the term of existing licenses by rulemaking”).

⁴⁸ In this regard, we observe that no party sought a stay of their EAS obligations at the time the Commission adopted them; that since Petitioners’ initial filing of its Petition in 2005 predicting difficulties, we have received no indication that any entity has, in practice, experienced any problems complying with its obligations (*e.g.*, through the filing of a waiver petition or a supplement to the Petition); and we have received no convincing explanation

any event, we observe that the FSS EAS certification regime was adopted as an optional mechanism through which DTH-FSS licensees can delegate the performance of EAS obligations for which they are ultimately responsible to their DTH-FSS video programming distributor lessees. While the Commission contemplated this as one option for meeting these obligations, it did not suggest that it would be the only one available. Accordingly, those DTH FSS licensees that do not consider it feasible or efficient to delegate performance of these obligations to their DTH-FSS video programming distributor lessees always have the option of relying on their own devices to meet these obligations themselves.

14. With respect to Petitioners' request that we exempt from EAS requirements DTH-FSS services that are directed primarily to consumers outside the U.S., but incidentally received by consumers in the U.S., we agree with Petitioners that EAS obligations should not apply in such cases.⁴⁹ We do not believe the Commission intended for EAS obligations to be applied to DTH-FSS-based services that are directed to consumers outside the U.S., but which incidentally include geographic overlap with the U.S. by virtue of the satellite transponder's footprint. In adopting the DBS service definition in section 25.701(a), the Commission emphasized that this definition would capture those services "for which viewers may have expectations as to available warnings based on experience with broadcast television services."⁵⁰ Such expectations are unlikely to be shared by viewers outside the U.S. The Commission also observed that "extending national level EAS requirements to DBS providers serves the public interest by ensuring that the significant portion of the American public that are DBS subscribers have access to this critical emergency information."⁵¹ To require that programming intended for consumers outside of the U.S. comply with the EAS rules would significantly increase regulatory burdens on DTH-FSS service providers without delivering a measurable benefit to an unintended U.S. audience that is unlikely to be watching the DTH-FSS programming. Such a result would be inconsistent with the Commission's stated rationales and intent for extending EAS obligations to DBS services. At the same time, we are mindful that U.S. consumers who have a reasonable basis to expect that EAS alerts will be offered over such DTH-FSS services receive alerts consistent with those expectations.

15. Accordingly, in balancing these policy objectives, we grant partial reconsideration of our EAS rules to Petitioners to ensure that DTH-FSS licensees⁵² deliver EAS alerts to DTH-FSS service consumers within the United States that have an expectation that they will receive EAS alerts,⁵³ rather than to U.S.-based consumers who incidentally receive such DTH-FSS services. Petitioners have argued that the DTH-FSS EAS obligations should be triggered based on the U.S. territory encompassed within the FSS licensee's transponder footprint and propose a trigger based on whether 50% of the area or population within the DTH-FSS transponder footprint is within the contiguous United States (CONUS).⁵⁴ We agree that the geographic area covered by the DTH-FSS transponder footprint is an appropriate

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articulating how or why the rules were unduly burdensome. In light of the dearth of evidence in the record that the application of the current EAS rules to DTH-FSS providers has proven unworkable because of the constraints of their existing contractual obligations, we find that there is insufficient basis to revisit these rules now, except for the limited exception noted below. *See infra* paras. 16-17.

⁴⁹ *See* Petition at 11-12.

⁵⁰ *EAS First Report and Order*, 20 FCC Rcd 18645-46, para. 49.

⁵¹ *Id.* at 18647-48, para. 54.

⁵² Operators of non-U.S. licensed satellites that communicate with earth stations in the United States are not licensed by the FCC, but nonetheless may be granted access to the U.S. market. *See* 47 CFR § 25.137. The use of the term "licensee" in this discussion is not intended to exclude recipients of U.S. market access from EAS obligations. Rather, the term "licensee" should be considered synonymous with the term "licensee" for purposes of EAS obligations.

⁵³ *EAS First Report and Order*, 20 FCC Rcd 18646, para. 53.

⁵⁴ Petition at n.16.

measure of whether the DTH-FSS is focused on U.S. consumers, but disagree that it should be the sole measure. Use of geographic area coverage area alone could exclude substantial portions of the U.S. from receiving EAS alerts where consumers could reasonably expect EAS to be provided. For example, under Petitioners' suggestion, a DTH-FSS transponder could be centered on a U.S. city on the border with Mexico and have DTH-FSS service that is marketed actively to U.S. consumers in that city, but would be exempt from the EAS rules if more than 50% of the transponder footprint covered Mexico.⁵⁵ We do not find such a result to be in the public interest.

16. We therefore establish multiple criteria by which we will determine whether the DTH-FSS programming is directed to a United States audience for purposes of determining EAS obligations, or is merely incidentally received: (1) whether the center of the footprint of the antenna beam associated with the transponder used to provide the DTH-FSS service is within the United States;⁵⁶ (2) whether at least 50 percent of the footprint of the antenna beam associated with the transponder used to provide DTH-FSS covers territory within the United States;⁵⁷ or (3) whether the DTH-FSS service is marketed to U.S. consumers, either through advertising campaigns or promotional materials that are focused on potential subscribers located within the United States.⁵⁸ If any of these three factors is present, we find that it is likely that the DTH-FSS service is focused on U.S. consumers, and therefore is within the intended scope of the Commission's EAS rules.

17. Finally, with respect to the DTH-FSS EAS obligation triggering criteria that the video program distributor's service include a sufficient number of channels such that four percent of the total applicable programming channels yields a set aside of at least one channel of non-commercial programming,⁵⁹ we observe that the Commission previously has clarified that this four percent set aside threshold is not triggered until at least 25 channels of video programming are being offered.⁶⁰ To the extent it was not clear that this earlier finding also applies in the FSS EAS context, we incorporate it here.

IV. PROCEDURAL MATTERS

A. Accessible Formats

18. To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (TTY).

B. Paperwork Reduction Act

⁵⁵ Similarly, we decline to limit our determination to coverage of CONUS, as Petitioners propose. Using the same example, a DTH-FSS transponder could be centered on a major population center in Hawaii, and the DTH-FSS service could be marketed actively to consumers in that city, but if slightly more than 50% of the transponder footprint fell over the Pacific Ocean, then the service would be exempt from EAS provision obligations. We see no reason to exclude U.S. citizens in Alaska, Hawaii, or other U.S. Territories and Possessions from the benefits of receiving EAS notifications.

⁵⁶ A transponder "footprint" is the terrestrial coverage area for a particular satellite transponder. Having the center of the beam focused on the US is an indication that the beam is "focused principally" on the US and thus is consistent with Petitioners' suggestion. See Petition at n.16.

⁵⁷ See Petition at n.16.

⁵⁸ Contrary to Petitioners' assumption that services directed principally outside of the US may be marketed to US consumers without triggering EAS obligations, we find that marketing to a US audience creates the expectation in a US audience that it would receive alerts "based on experience with broadcast television." *EAS First Report and Order*, 20 FCC Rcd 18645-46, para. 49.

⁵⁹ See *id.*

⁶⁰ See *DBS Public Interest Order*, 13 FCC Rcd. 23254, 23266, n.58; see also *supra* note 12.

19. This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. Therefore, it does not contain any new or modified information collection burdens for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4).

C. Congressional Review Act

20. The Commission will send a copy of this Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act. *See* 5 U.S.C. § 801(a)(1)(A).

D. Supplemental Final Regulatory Flexibility Analysis

21. As required by the Regulatory Flexibility Act of 1980, as amended, we have prepared a Supplemental Final Regulatory Flexibility Analysis (Supplemental FRFA) as set forth in the Appendix, addressing the actions taken in this Order.⁶¹

E. Additional Information

22. *People with Disabilities.* To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

23. *Additional Information.* For additional information on this proceeding, contact Gregory Cooke of the Public Safety and Homeland Security Bureau, Policy and Licensing Division, gregory.cooke@fcc.gov, (202) 418-2351.

V. ORDERING CLAUSE

24. Accordingly, IT IS ORDERED that pursuant to sections 1, 2, 4(i), 4(o), 301, 303(r), 303(v), 307, 309, 335, 403, 405, and 706 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i) and (o), 301, 303(r), 303(v), 307, 309, 335, 403, 405, and 606, and section 1.429 of our rules, 47 CFR § 1.429, the petition for partial reconsideration filed by PanAmSat Corporation, SES Americom, Inc., and Intelsat, Ltd., IS DENIED in part and GRANTED in part, as specified herein.

25. IT IS FURTHER ORDERED that this Order on Reconsideration WILL BECOME EFFECTIVE thirty days from the date of publication in the Federal Register.

⁶¹ 5 U.S.C. §604.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX

Supplemental Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980 (RFA),⁶² as amended, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Notice of Proposed Rulemaking* (NPRM), adopted in August 2004.⁶³ The Commission sought written public comment on the proposals in the NPRM, including comments on the IRFA. No comments were filed addressing the IRFA. The Commission included a Final Regulatory Flexibility Analysis (FRFA) in Appendix D of the *EAS First Report and Order* in this proceeding.⁶⁴ This Supplemental Final Regulatory Flexibility Analysis (Supplemental FRFA) supplements the FRFA to reflect the actions taken in this *Order on Reconsideration* (Order) and conforms to the RFA.⁶⁵

A. Need for, and Objective of, the Order

2. In the *EAS First Report and Order*, the Commission extended Emergency Alert System (EAS) obligations to digital television and radio, digital cable, and satellite television and radio services.⁶⁶ Among other things, the Commission extended EAS obligations to Direct Broadcast Satellite (DBS) services, as defined in section 25.701(a)(1)-(3) of the Commission's rules.⁶⁷ As used in section 25.701(a), the definition of DBS includes entities licensed to operate Fixed Satellite Service (FSS) satellite in the Ku band⁶⁸ that "sell or lease capacity to a video programming distributor that offers service directly to consumers providing a sufficient number of channels so that four percent of the total applicable programming channels yields a set aside of at least one channel of non-commercial programming pursuant to [section 25.701(e) of the Commission's rules]" (hereinafter, "DTH-FSS licensees").⁶⁹

3. In this Order, we grant, to the extent described herein, a petition for partial reconsideration of the *EAS First Report and Order* jointly filed in 2005 by PanAmSat Corporation, SES Americom, Inc., and Intelsat, Ltd. (collectively, Petitioners). In particular, we deny all the specific requests made by Petitioners, and we clarify the criteria triggering when the EAS obligations apply to DTH-FSS licensees.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

4. There were no comments filed that specifically addressed the proposed rules and policies presented in the IRFA.

⁶² 5 U.S.C. § 603. The RFA, 5 U.S.C. §§ 601-612, was amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, 110 Stat. 847 (1996).

⁶³ See *Review of the Emergency Alert System*, EB Docket No. 04-296, Notice of Proposed Rulemaking, 19 FCC Rcd 15775 (2004) (*Notice of Proposed Rulemaking*), Appendix A.

⁶⁴ See *Review of the Emergency Alert System*, EB Docket No. 04-296, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 18625 (2005) (*EAS First Report and Order*), Appendix D.

⁶⁵ See 5 U.S.C. § 604.

⁶⁶ See *EAS First Report and Order*, 20 FCC Rcd at 18636, para. 1; see also 47 CFR § 1111(a).

⁶⁷ See *id.* at 18645-46, para. 49; see also 47 CFR § 1111(a).

⁶⁸ The term "Ku band" for purposes of this *Order* refers to the 11.7-12.2 GHz (space-to-Earth) and 14.0-14.5 GHz (Earth-to-space) bands. See 47 CFR § 25.103.

⁶⁹ 47 CFR § 25.701(a)(2).

C. Response to Comments by the Chief Counsel for Advocacy of the Small Business Administration

5. Pursuant to the Small Business Jobs Act of 2010, which amended the RFA, the Commission is required to respond to any comments filed by the Chief Counsel of the Small Business Administration (SBA), and to provide a detailed statement of any change made to the proposed rule(s) as a result of those comments.⁷⁰

6. The Chief Counsel did not file any comments in response to the proposed rule(s) in this proceeding.

D. Description and Estimate of the Number of Small Entities to Which the Rules Would Apply

7. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted herein.⁷¹ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”⁷² In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.⁷³ A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.⁷⁴

8. As noted above, a FRFA was incorporated into the *EAS First Report and Order*. In that analysis, the Commission described in detail the small entities that might be significantly affected by the rules adopted in the *EAS First Report and Order*.⁷⁵ In this Order, we hereby incorporate by reference the descriptions and estimates of the number of small entities from the previous FRFA in this proceeding.

E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

9. The data, information and document collection required by the *EAS First Report and Order* as described in the previous FRFA in this proceeding is hereby incorporated by reference.⁷⁶ The actions taken in this Order do not amend or otherwise revise those requirements, except to refine the criteria that determine when DTH-FSS licensees are subject to EAS obligations. More specifically, we find that the criteria triggering DTH-FSS EAS obligations⁷⁷ only applies in instances where the FSS

⁷⁰ 5 U.S.C. § 604(a)(3).

⁷¹ *Id.* § 603(a)(4).

⁷² *Id.* § 601(6).

⁷³ *Id.* § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

⁷⁴ 15 U.S.C. § 632.

⁷⁵ See *EAS First Report and Order*, 20 FCC Rcd at 18699-704, paras. 5-16.

⁷⁶ See *id.* at 18704-05, paras. 17-23.

⁷⁷ Specifically, that the DTH-FSS licensee “sell or lease capacity to a video programming distributor that offers service directly to consumers providing a sufficient number of channels so that four percent of the total applicable

capacity sold or leased to the video programming distributor is effected over a DTH-FSS transponder for which (1) the center of the footprint of the antenna beam associated with the transponder used to provide the DTH-FSS service is within the United States, (2) at least 50 percent of the footprint of the antenna beam associated with the transponder used to provide DTH-FSS covers territory within the United States, or (3) where the DTH-FSS service is marketed to U.S. consumers, either through advertising campaigns or promotional materials that are focused on potential subscribers located within the United States. If any of these three factors is present, we find that it is likely that the DTH-FSS service is focused on U.S. consumers.⁷⁸ This aspect of the decision is consistent with the Commission's intent expressed in the *EAS First Report and Order* for extending EAS alert delivery to American subscribers of DBS services.⁷⁹

F. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

10. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): “(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) and exemption from coverage of the rule, or any part thereof, for small entities.”⁸⁰

11. The analysis of the Commission's efforts to minimize the possible significant economic impact on small entities as described in the previous FRFA in this proceeding is hereby incorporated by reference.⁸¹

Report to Congress

12. The Commission will send a copy of this *Order on Reconsideration*, including this Supplemental FRFA, in a report to Congress pursuant to the Congressional Review Act.⁸² In addition, the Commission will send a copy of this *Order on Reconsideration*, including this Supplemental FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of this *Order on Reconsideration* and Supplemental FRFA (or summaries thereof) will also be published in the *Federal Register*.⁸³

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programming channels yields a set aside of at least one channel of non-commercial programming pursuant to [section 25.701(e) of the Commission's rules].” See 47 CFR § 25.701(a) (cross-reference at 47 CFR § 11.1(a)).

⁷⁸ With respect to the criteria requirement that the video program distributor's service include a sufficient number of channels such that four percent of the total applicable programming channels yields a set aside of at least one channel of non-commercial programming, the Commission previously has clarified that this four percent set aside threshold is not triggered until at least 25 channels of video programming are being offered. See *DBS Public Interest Order*, 13 FCC Rcd. 23254, 23266, n.58; see also *supra* note 12. To the extent it was not clear that this earlier clarification also applies in the EAS FSS context, we incorporate it in the Order.

⁷⁹ See *EAS First Report and Order*, 20 FCC Rcd 18647-48, para. 54. See also *id.* at 18645-46, para. 49.

⁸⁰ 5 U.S.C. § 603(c)(1)-(4).

⁸¹ See *EAS First Report and Order*, 20 FCC Rcd at 18706-07, paras. 24-26.

⁸² 5 U.S.C. § 801(a)(1)(A).

⁸³ *Id.* § 604(b).